

Supreme Court, U. S.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 76-398

THE CITIZENS AND SOUTHERN NATIONAL BANK,
Petitioner,

v.

NICK BOUGAS,
Respondent.

On Writ of Certiorari to the
Court of Appeals of the State of Georgia

BRIEF FOR THE RESPONDENT

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SUMMARY OF ARGUMENT

It is a logical statutory interpretation, and does not usurp the legislative function of Congress, for this Court to hold that the opening and maintaining of a branch bank constitutes waiver of any venue privilege afforded to a national bank by 12 U.S.C. §94.

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The statute does make a distinction between "established" and "located", and it is proper and logical for a state appellate court to find venue over a national bank in a county other than the one in which its charter was issued, provided the national bank has either established a branch or conducted business in that county.

ARGUMENT

Introduction

This case revolves around the questions of what actions on behalf of a national bank constitute waiver of the venue provisions of 12 U.S.C. §94, and where a national bank is located within the meaning of 12 U.S.C. §94.

1.

The first basis on which the decision of the Court of Appeals can be affirmed is that a national bank waives venue by the opening and operation of a branch bank in a county. This aspect was broached by the Court of Appeals in its decision, and it has been the premise on which the question has been decided in other jurisdictions. Lapinsohn v. Lewis Charles, Inc., 212 Pa. Super. 185, 240 A.2d 90, cert. denied 393 U.S. 952 (1968); Security Mills of Asheville, Inc. v. Wachovia Bank & Trust Co., 281 N.C. 525,

189 S.E.2d 266 (1972); Reeves v. Bank of America, 352 Fed. Supp. 745, (1973 D.C. Cal.); Frankfurt Supply Co. v. Mateau, 320 Fed. Supp. 794. As to conducting business in a county constituting waiver, see Vann v. First National Bank, 324 So.2d 94 (Fla. App. 1976).

2.

The other basis on which the Court of Appeals' decision should be affirmed is that a national bank is located in any county in which it operates and maintains a branch. This rests on the provisions of the statute, 12 U.S.C. §94, which uses "located" rather than "established" in regard to suits in state courts. Security Mills of Asheville, Inc. v. Wachovia Bank and Trust Co.; (alternative holding) Holson v. Gosnell, 264 S.C. 619, 216 S.E.2d 539 (1975) cert. denied, 423 U.S. 1048 (1976); Central Bank v. Superior Court, 30 Cal. App. 3d 962, 106 Cal. Rptr. 912 (1973).

A. THE MAINTENANCE OF BRANCH BANKS
DOES CONSTITUTE A WAIVER OF 12
U.S.C. §94 VENUE

As pointed out by petitioner in its Brief, the courts have historically acknowledged that the venue provisions of 12 U.S.C. §94 can be waived. The question for this Court to determine is what action or actions constitute waiver. Petitioner argues to the Court that a specific waiver would be required in each and every case in which suit was filed against petitioner or any other national bank and argues that venue is waived only by the national bank failing to raise what it contends is the venue privilege. Respondent contends that the knowing, intelligent business decision to open and maintain a branch bank to avail itself of business opportunities in that particular county constitutes a knowing assumption of responsibilities that flow with the opening and maintenance of the branch bank, such as the payment of taxes therein;

and constitutes a waiver of venue. This Court has long recognized that the benefits afforded by statute could be waived. First National Bank v. Morgan, 132 U.S. 141, 145 (1889). Respondent contends that the opening and maintenance of a branch bank constitutes a knowing waiver of 12 U.S.C. §94 venue by a national bank.

This Court has the authority and responsibility to reach a judicial determination as to what actions on behalf of the bank constitute waiver of venue under 12 U.S.C. §94. This function can be performed by this Honorable Court by statutory interpretation, without legislating. The social reasons why respondent's position should be adopted by the Court include: (1) the fact that justice is and will be denied to countless litigants because of the expense and practical considerations if the harsh interpretation advocated by petitioner is adopted by the Court; and (2) that national banks

should not be allowed to avail themselves of the protection provided by a forum's laws unilaterally. In this case, C&S had filed previous litigation involving some of the issues in this case in the State Court of DeKalb County, the forum in which this case is pending, and yet C&S is now asserting its interpretation of the venue statute to avoid the jurisdiction of that Court. As set forth by the author in "Waiver of Venue Under the National Bank Act: Preferential Treatment for National Banks", Iowa Law Review, Vol. 62/No. 1, page 129, it is the obligation of the judiciary, and not the Congress, to determine whether a national bank has waived its venue privilege.

**B. A NATIONAL BANK IS "LOCATED" IN
ANY COUNTY IN WHICH IT OPERATES
AND MAINTAINS BRANCHES OR CONDUCTS
BUSINESS**

The question as to whether or not opening and maintaining a branch bank causes a national bank to be located within a particular county

other than the one in which its charter has been issued is related to what actions constitute a waiver of venue. But, based upon interpretation of the statute, the Court of Appeals' ruling and decision that a national bank can be established only in its district but located in any county in which it had established a branch bank or conducted business is not, as petitioner would contend, "fatally flawed in its analytic base", as there is a difference in the statutory language and scope of the matter. This is predicated in part on the fact that federal districts frequently encompass many counties and that the interpretation is one of state versus federal construction and application. 12 U.S.C. §94, for whatever reason, does contain a distinction in its language, using "established" in one place and "located" in another. The difference in the wording of the statute and the interpretation of "located"

has been the basis for decision in several state appellate courts. Bougas v. The Citizens and Southern National Bank, 138 Ga. 706; Security Mills of Asheville, Inc. v. Wachovia Bank and Trust Co., supra.; Holson v. Gosnell, supra.; Central Bank v. Superior Court, supra.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision in the Georgia Court of Appeals should be affirmed.

Respectfully submitted,

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